No. 15296

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

RICHFIELD OIL CORPORATION,

Appellant,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S REPLY BRIEF.

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Introductory Statement.

The most that can be said for appellee's brief is that it raises issues of fact necessitating a trial on the merits.

In the following pages we will show how appellee has run out on its stipulation and has presented questions and raised issues of fact which cannot be considered by this Court.

In the interest of orderly presentation, our discussion will follow the headings in appellee's brief.

The Section of Appellee's Brief Entitled "Questions Presented."

Here appellee takes the first step in repudiating its stipulation, entered into with the consent of the trial court, that the exceptive allegations and the verified answer thereto would be a part of the record on appeal before this Court. The questions to be considered here, therefore, cannot be as stated by appellee.

Since "voluntary payment" is an affirmative defense, like raising the statute of limitations, it is not necessary for the appellant to anticipate or negative it in the libel. When the defense of voluntary payment was raised by exceptions and exceptive allegations, it was proper for the appellant to answer the exceptive allegations under oath. Appellant's verified answer to the exceptive allegations included an allegation that there had been a telephonic agreement by appellee's counsel to accept payment under protest with appellant reserving the right to sue for recovery. This was a complete answer to the exceptive allegations and must be accepted as true in this summary proceeding, and the trial court erred in not so holding.

If those allegations are not accepted as true, then there are presented issues of fact, necessitating a trial on the merits. "Controverted issues may not suitably be tried upon exceptions."

Benedict on Admiralty (6th Ed.), Sec. 333;
Frederick Hart & Co. v. Recordograph Corp., 169 F. 2d 580 (C. A. 3, 1948);
Klein v. Lionel Corp., 18 F. R. D. 184 (1955);
G. Ricordi & Co. v. Slomanson, 19 F. R. D. 196 (1956).

The Section of Appellee's Brief Entitled "Counter-statement of the Case."

Here appellee takes the second step in its repudiation by asserting that the matter of the reservation of rights is unsupported in the record. By stipulation of the parties, the verified answer to the exceptive allegations, which expressly alleges the reservation of the right to sue for recovery, was made a part of the record on appeal. It was before the trial court, it is in the record by stipulation, and this is a trial *de novo* on the record.

Appellee then refers to a prior case which involved some *but not all* of the facts alleged herein. The payment sought to be recovered in the case at bar was made long after the decision of this Court at 207 F. 2d 864 and involves additional facts including specifically an allegation of payment under protest with a reservation of the right to sue for recovery. The discussion by this Court in the cited case, relied upon in appellee's brief, had nothing to do with the issues here presented. If it did, it is not controlling because that discussion was not necessary to the disposition of that case and is, therefore, dictum.

Under the authorities which have been cited in appellant's brief, the payment to prevent the seizure of its property is clearly involuntary. Additionally, the law is clear that a payment under protest with the express reservation of the right to sue for recovery is not a voluntary payment and can be recovered.

The Section of Appellee's Brief Entitled "The Correspondence Exhibited With the Pleadings."

Under this heading appellee reviews certain correspondence, of which part was attached as exhibits to the amended libel, part was attached to appellee's exceptive allegations, and part was attached to appellant's answer to the exceptive allegations. That the correspondence took place is not questioned, but appellee attempts to decide the meaning of that correspondence and then concludes that such meaning is contrary to certain allegations of appellant. This, we submit, is raising issues of fact which cannot be done in a summary procedure such as this.

Frederick Hart & Co. v. Recordograph Corp., supra;

United States v. Krasnov, 143 Fed. Supp. 184 (1956);

Klein v. Lionel Corp., supra;

G. Ricordi & Co. v. Slomanson, supra.

Appellee attempts to show inconsistencies. Those are issues of fact for the court below to decide in a trial on the merits.

The Section of Appellee's Brief Entitled "Richfield's Amended Libel."

Under this section appellee completely abandons its stipulation and challenges the truth of appellant's answer to the exceptive allegations, which must be accepted as true for the purpose of considering appellee's exceptions.

In the last paragraph of this section, appellee makes the point that the amended libel does not show the oral agreement and states categorically that Richfield's letter

of August 26, 1955, "shows there was no such condition attached by Richfield to the protested payment." It is clear from a reading of the answer to the exceptive allegations that the agreement was an oral agreement and the letter of August 26, 1955, speaks for itself; it was simply a protest letter made for the purpose of stating the grounds upon which the validity of the payment ultimately would be challenged.

It is not necessary to allege in a libel facts which will negative an affirmative defense, and the affirmative defense of voluntary payment was raised by exceptions and exceptive allegations to the libel. The answer thereto was a complete negation, and appellee has stipulated that such answer shall be a part of the record on appeal. Appellee's repudiation of its stipulation is surprising to say the least.

The Section of Appellee's Brief Entitled "The Exceptions and Exceptive Allegations."

Here again appellee is attempting to resolve an issue of fact. Appellee has asserted several times that the $75,000.00 demand was reduced by a compromise offer to $34,158.02. The allegations in the amended libel show clearly that appellee's interpretation just is not correct [R. 10, 11, 12, 14, 16, 27 and 39]. This is further demonstrated by libelant's answer to respondent's exceptions and exceptive allegations [R. 38-43]. The pleadings do not show a compromise settlement but rather show an arbitrary plan adopted by the Government. Appellee is questioning the facts alleged. That it cannot do.

Frederick Hart & Co. v. Recordograph Corp., supra.

The Section of Appellee's Brief Entitled "Richfield's 'Answer' to the Exceptions and Exceptive Allegations."

It is true that libelant filed a document entitled "Answer to Respondent's Exceptions and Exceptive Allegations to the Amended Libel" instead of the "usual affidavit in opposition to the exceptive allegations." This would appear to be an immaterial variation from the usual practice, for the so-called answer was verified and has the same dignity and effect that an affidavit in opposition would have.

Under this section appellee quotes from that answer and asserts that such statement, which Richfield's counsel made under oath, is directly contrary to his letter of August 26, 1955, accompanying the payment under protest. Then, on page 14 of the brief in the argument section, appellee says that "Richfield's belated attempt to rely upon the alleged prior telephone conversation is frustrated by the parol evidence rule," and, referring to the letter of protest dated August 26, 1955, that "this letter agreement cannot now be varied by parol evidence as to prior telephone negotiations."

The parol evidence rule is in no way involved for two reasons. First, the letter of August 26, 1955, was not an agreement but a pure and simple protest reciting the grounds upon which it was contended that the claim of the Government was illegal and improper. Secondly, the telephonic agreement in no way varied the letter of August 26, 1955. The letter and the oral agreement are perfectly consistent. Actually, in view of the fact that the Government had steadfastly refused to accept payment under protest [R. 49] until the oral agreement, it follows that some agreement must have been reached for

the Government to accept payment under protest because it did accept the payment with the protest letter of August 26, 1955.

Moreover, it is significant that appellee did not get and present to the court below an affidavit from Mr. Pimper to controvert the allegations contained in the answer to the exceptive allegations. Not only does that verified answer stand uncontroverted in the record, but, as a matter of law, it must be accepted as true.

The Section of Appellee's Brief Entitled "The Order Dismissing the Amended Libel."

Under this section appellee makes the point that Richfield did not seek to further amend its libel to include its assertions contained in the answer to the exceptive allegations. Counsel for appellee knows full well that such an amendment would have been an idle act, for at the time the stipulation was entered into with the approval of the Court, the Court had indicated clearly that if the libel were so further amended, he would still dismiss it. Under that state of facts and with the stipulation of the parties that the "answer" would be considered part of the record on appeal (which is a trial *de novo* on the record), libelant declined to further amend.

If appellee can now run out on that stipulation, or if the Court does not want to consider the allegations contained in the "answer," then this Court should remand the cause to the District Court with instructions to permit libelant to further amend the amended libel.

The Section of Appellee's Brief Entitled "Summary of Argument."

Under this summary of argument appellee makes two points; first, that Richfield's *amended libel* does not allege any agreement that it would pay under protest and sue to recover; and second, that this Court's previous Richfield decision establishes that payments under threat of withholding and offset by the Government are voluntary and not recoverable. These points are discussed below.

Appellee's Argument on Its Two Points.

Point I.

As to the first point, it is evident that appellee has turned its back completely upon its stipulation, for it says in effect that because appellant did not allege in its amended libel the facts which are stated in its answer to the exceptive allegations and refused to further amend the amended libel to incorporate such allegations, it "now has no right to raise the point at all." (Appellee's Br. p. 13, line 3.)

In other words, appellee takes the position that the answer to the exceptions and the exceptive allegations does not exist for the purpose of this appeal even though appellee stipulated that it would become a part of the record on appeal and this is a trial *de novo* on the record.

This Court should not tolerate such conduct.

Under this heading there will be found many places where the appellee asserts that no agreement to accept payment under protest took place between Richfield's counsel and Mr. Pimper, as is alleged in the answer to the exceptive allegations. Here again, appellee is attempting to put itself in the position of a trial court trying issues

of fact during a trial on the merits. It is simply challenging the truth of the allegations which it must accept as true for the purpose of its exceptions. This we have shown it cannot do, and the trial court erred when it decided that no agreement existed and sustained the exceptions.

Frederick Hart & Co. v. Recordograph Corp., supra.

In the *Frederick Hart* case there had been an allegation in the complaint that the defendant charged the plaintiff with infringement, claimed royalties, and asserted rights under 15 patents. Hart denied infringement, alleged invalidity of the 15 patents, and asked for declaratory judgment. The defendant filed interrogatories and moved to dismiss, filing supporting affidavits. Hart then filed counteraffidavits challenging the former's correctness.

That factual situation is quite similar to the situation presented here. In both cases the court had before it allegations in the complaint supplemented by sworn statements. There the Court said at page 583:

> "The foregoing clearly establishes the *existence of a fact issue* with respect to what was actually said by Murray to Weber. It was at that point that the District Court's consideration should have terminated and Recordograph's motion denied. Instead, the District Court proceeded to *decide* the fact issue and thereby committed error under the applicable principles of law stated earlier in this opinion. It is immaterial that it *decided* the fact issue in Recordograph's favor—the point is that it went beyond its province to resolve any fact issue on a motion to dismiss or for summary judgment." (Emphasis supplied by the court.)

Point II.

As to the second point of appellee's argument, it is asserted that because the Government has the right to offset claims against moneys due a contractor, the threatened act of offsetting does not constitute duress because, under the older cases cited and relied upon by appellee, the payment of the Government's claim to prevent offset is not duress in the legal sense.

We have shown in our opening brief that appellee's harsh rule has been greatly modified and that under the later cases, notably *Southern Pacific Co. v. United States,* 268 U. S. 263, 69 L. Ed. 947 (1925), payments under protest are recoverable.

Moreover, offset is a summary remedy just like distress which is the seizure or withholding of the property of another. The yielding to an illegal demand to pay in order to prevent seizure of one's property is not a voluntary payment,

> *Atchison, Topeka & Santa Fe Ry. Co. v. O'Connor,* 223 U. S. 280, 56 L. Ed. 436 (1912)

and it has been expressly held that where the payment was made to avoid "possible deduction from moneys thereafter to become due to plaintiff from the United States," and without waiver of right to sue for recovery the payment may be recovered.

> *Empire Engineering Co. v. United States,* 59 Ct. Cls. 904 (1924).

It follows that the summary seizure of property by offset is recognized as a threatened action sufficient to make involuntary a payment made to prevent this occurrence, just as a payment is involuntary when it is made to prevent distress of property. That is precisely what happened here.

It should be pointed out at this time that even if libelant did not show duress and did not agree to pay under protest with a reservation of the right to sue for recovery, libelant still has stated a cause of action in this case under the authorities.

Swift and Courtney and Beecher Co. v. United States, 111 U. S. 22, 28 L. Ed. 341 (1884).

Under the rule of the *Swift* case, where the officers of the Government had established a course of conduct contrary to law, refused to deviate from that course, and made their decision known, it is unnecessary to follow any other course of action.

Here, the appellee established a course of conduct contrary to law (as alleged in the libel) whereby it demanded sums of money from libelant which were not due from libelant and refused to accept payment thereof under protest with a reservation of the right to sue for recovery. Under the circumstances, it was not necessary to show duress and libelant would not have had to pay under protest reserving the right to sue for recovery, in order for its libel to state a cause of action.

In the *Swift* case, as here, the Government asserted that the payment was voluntary and could not be recovered. The question presented on appeal was whether such payments were made voluntarily in such a sense as to preclude recovery. The Court answered the question in the negative, and on the question of whether or not a formal protest was necessary said at page 344:

> "No formal protest, made at the time, is, by statute, a condition to the present right of action, as in cases of action against the collector to recover back taxes

illegally exacted; and the protests spoken of in the findings of the Court of Claims as having been made prior to 1866 by manufacturers of matches and others requiring such stamps, are of no significance, except as a circumstance to show that the course of dealing prescribed by the Commissioner had been deliberately adopted, had been made known to those interested and would not be changed on further application and that, consequently, the business was transacted upon that footing, because it was well known and perfectly understood that it could not be transacted upon any other. *A rule of that character, deliberately adopted and made known and continuously acted upon, dispenses with the necessity of proving in each instance of conformity that the compliance was coerced.* This principle was recognized and acted upon in *U. S. v. Lee,* 106 U. S., 196-200 (XXVII., 171-174), where it was held that the officers of the law, having established and acted upon a rule that payment would be received only in a particular mode, contrary to law, dispensed with the necessity of an offer to pay in any other mode, and the party thus precluded from exercising his legal right was held to be in as good condition as if he had taken the steps necessary by law to secure his right." (Emphasis added.)

Here we have gone beyond what is required. We have alleged duress and coercion, and we have alleged an agreement on the part of the Government to accept the payment under protest with a reservation of the right to sue for recovery.

Conclusion.

The matter of voluntary payment is a matter of defense, like raising the statute of limitations, which could have been waived. Libelant does not have to anticipate such a defense in the libel. Having been raised by exceptive allegations, however, it is proper to answer those exceptive allegations. That has been done in this case, and by stipulation of the parties, with the approval of the Court, the exceptive allegations as well as the answer thereto have been made a part of the record on appeal.

Like any other facts presented to the Court in a summary proceeding such as this, the facts must be accepted as true. Appellee's brief is alleging the existence of issues of fact, for the Government is controverting certain facts alleged and taking others and telling the Court they must be interpreted in a certain way. Thus issues of fact are presented and the only course open to this Court is to remand the case for trial.

Respectfully submitted,

David Guntert,

Attorney for Appellant.